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No. 97-1012

IN THE
# Supreme Court of the United States
October Term, 1997

ROBERT J. COUPÉ

*Petitioner*

*v*

FEDERAL EXPRESS CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to correct an irreconcilable conflict between an agency regulation and a statute. The FAA's Age 60 Rule, 14 C.F.R. § 121.383(c), requires that all pilots in operations subject to the rule retire when they reach age 60. The Age Discrimination in Employment Act (ADEA), prohibits age-based discharge unless the employer can prove that age is a bona fide occupational qualification (BFOQ). In the Petition for Certiorari we showed that the Age 60 Rule's sweeping and inflexible requirement that all scheduled airline pilots retire at age 60 is incompatible with the requirement that the BFOQ exception should be "narrowly construed," 29 C.F.R. § 1625.6(a), and must be "resolved on a 'case-by-case basis,'" *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985). We also related how the dubious scientific justification for the Rule has led other courts of appeal

to criticize and limit the rule or to uphold it on grounds that are in conflict with those of the decision below.

Respondent's defense of the Age 60 Rule as a BFOQ (Respt.'s Br. at 6) and its assertion that there is no statutory conflict between the Age 60 Rule and the ADEA (Respt.'s Br. At 7-8) are both perfunctory. Federal Express, does not dispute that the *Criswell* case and the EEOC regulations require an individualized determination as to whether a specific age can constitute a BFOQ for a particular job or that the Age 60 Rule, which applies to pilots in both passenger and cargo operations, is not particular in its application. Instead, the focus of Federal Express's argument here, as in the court below, is that a suit against the employer "is not the proper proceeding to contest the FAA's determination." Respt.'s Br. At 3. We reply to Respondent's contentions here.

## I.

## THIS PROCEEDING IS THE CORRECT VEHICLE FOR PETITIONER TO ASSERT HIS RIGHTS UNDER THE ADEA.

Federal Express's assertion that the proceeding below is improper has two prongs. First, Respondent urges that it is the wrong party for its employee to sue because "it is the FAA, not Respondent, that has an interest in defending this Rule." Respt.'s Br. at 1. Second, Federal Express argues that the proper procedure for Petitioner to follow would have been to appeal the FAA's denial of his petition for an exemption from the Rule. *Id.* Both of these concerns figured prominently in the Sixth's Circuit's decision below. *See* App. A at a-4, a-9.[1]

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[1]Refers to the appendix of the Petition for Certiorari.

The unusual posture of the parties and the existence of a procedure by which Petitioner could theoretically have sought redress from the FAA do not diminish the validity of his claim nor the importance of review by this Court. On the contrary, the employer's lack of a stake in defending the Rule reflects a conflict in the underlying statutes that has disturbed at least three other circuit courts and now needs to be resolved.

The ADEA unequivocally prohibits age-based discharge by employers except in circumstances where the employer can demonstrate that age is a bona fide occupational qualification. 29 U.S.C. §§ 623(a), 623(f). Neither the statute nor the EEOC regulations contains an exception for age-based discharge that is required by government regulation. On the contrary, the EEOC regulations specifically provide that state laws that set age limits for jobs cannot qualify as a BFOQ automatically but instead must independently "meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act." 29 C.F.R. § 1625.6(c). Moreover, the EEOC has taken the official position that the Age 60 Rule is not a BFOQ and therefore violates the ADEA. *See* Pet. for Cert. at 11, n. 5 and accompanying text; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122, n. 17 (1985).

Thus, the ADEA requires that, even when age discrimination is mandated by government regulation, the employer must prove that it is a BFOQ. But the ADEA does not give the employee a direct remedy against the regulator unless the regulator also happens to be the employer. When regulations requiring age-based discharge have been challenged at the state level, courts have routinely declared the state statutes to be in violation of the ADEA. Often the state itself may be joined in litigation against a local government or other employer that is enforcing a state statute. *See, e.g., Hahn v. City of*

*Buffalo*, 770 F.2d 12 (2d Cir. 1985); *EEOC v. County of Allegheny*, 705 F.2d 679 (3d Cir. 1983). But courts have also enjoined employers from complying with state mandated retirement policies in circumstances where the state government was not joined as a party. *See EEOC v. School Board of Pinellas Co.*, 742 F. Supp. 622 (M.D. Fla. 1990). *Cf.* cases cited in Pet. for Cert. at 22 (suits against private parties testing other law and regulations). Here, the only means available to Petitioner to obtain protection from discrimination under the ADEA was a suit against his employer.

Both Respondent and the court below assert that Petitioner's proper remedy was to appeal from the FAA's denial of his petition for an exemption from the Age 60 Rule. This procedure would require Petitioner to forfeit one of the key protections the ADEA grants to employees because it would reverse both the burden of proof and the standard of review. Under the ADEA the employer has the burden of proving that an age prohibition constitutes a BFOQ. 29 C.F.R. § 1625.6(b). By contrast, in an appeal from the FAA's denial of a petition for exemption, the petitioner bears a "heavy burden" to present "compelling evidence" that the FAA's decision was unfounded. *Baker v. FAA*, 917 F.2d 318, 319 & 322 (7th Cir.), *cert. denied*, 499 U.S. 936 (1991). Judge Wald noted this discrepancy in her dissent in *Professional Pilots Fed'n v. FAA*, 118 F.3d 758, 771, n.3 (D.C. Cir. 1997), *petition for cert. filed* Feb. 3, 1998 (No. 97-1267), where she compared the burden of proof in an exemption proceeding with that available under the Administrative Procedure Act and observed that, in contrast to exemption proceedings, "the APA requires the FAA to provide a sufficient explanation demonstrating that its actions are reasonable." In turn, the burden under the ADEA, requiring the employer to prove a BFOQ, is considerably more favorable to the employee than the burden a petitioner must sustain in an

appeal under the APA. Nothing in the ADEA or the regulations interpreting it suggests that an employee should have to relinquish his rights under that statute solely because the prohibited discrimination stems from a government agency rather than directly from the employer.[2]

## II.

## THE CONFLICT BETWEEN THE STATUTES AND IN THE CIRCUIT COURTS REQUIRES RESOLUTION BY THIS COURT.

Federal Express argues that there is "no conflict among the circuits" and "no statutory conflict" to merit the attention of this Court. Respt.'s Br. at 6,7. It submits that Petitioner's "criticisms of the Age 60 Rule" were "considered" by the D.C. Circuit in the *Professional Pilots* case and therefore do not require further review. Respt.'s Br. at 8.

As we noted in the Petition for Certiorari, *see* Pet. For Cert. at 19, the D.C. Circuit's opinion in *Professional Pilots* is premised on a wholly different interpretation of the underlying statutes from the decision here. The D.C. Circuit held that the FAA's powers under the former Federal Aviation Act superseded the ADEA's requirement that age-based prohibitions qualify as a BFOQ. The court below, by contrast, did not examine the FAA's statutory authority because it held that the

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[2]The availability of exemption proceedings as they relate to the Age 60 Rule is illusory. The FAA has never granted an exemption from the Age 60 Rule and announced in its December, 1995 Disposition that it would summarily deny all petitions for exemptions unless they proposed a new technique to assess the pilot's abilities and risk of incapacitation. *See, Aman v. FAA*, 856 F.2d 946, 948 (7th Cir. 1988); Pet. for Cert. at 15, n. 7.

Age 60 Rule qualified as a BFOQ. The *Professional Pilots* case is also before this Court on petition for certiorari, No. 97-1267, filed Feb. 3, 1998. Thus, there is an opportunity for this Court to consider the two cases together and address both the issues of administrative law raised in the *Professional Pilots* case and the civil rights issues raised in the case below.[3]

The compelling reason for a grant of certiorari is not the need to resolve a conflict between the Sixth Circuit's opinion here and the D.C. Circuit's opinion in *Professional Pilots*. It is rather the need to resolve the conflict between an agency regulation that requires age discrimination and a federal statute that prohibits it. This underlying statutory conflict prompted the court below to determine that the Age 60 Rule constituted a BFOQ although this Court's decision in *Criswell* held that such determinations should be based on the facts of each particular case. 472 U.S. at 422. The statutory conflict was noted by this Court in *Thurston* when it observed, without comment, that the EEOC did not consider the Age 60 Rule to qualify as a BFOQ. 469 U.S. at 122, n. 17. The conflict also underlies the criticism of the Age 60 Rule by the Ninth Circuit in *EEOC v. Boeing Co.*, 843 F.2d 1213, 1220 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988). Although the Seventh Circuit, in *Aman* and in *Baker* declined to address the age discrimination issues raised by the ADEA, *see Aman*, 856 F.2d at 956, n. 13, the court's questioning of the rule's necessity in the two cases indicates that

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[3]As Respondent points out, the pendency of this appeal and the *Professional Pilots* appeal at the same time is not fortuitous. The same counsel represent the petitioners in both cases with the intent that both the civil rights and the administrative aspects of the conflict between the Age 60 Rule and the ADEA could only be fully developed in separate suits under the respective governing statutes.

the rule is not required for air safety. *See Aman*, 856 F.2d at 949; *Baker*, 917 F.2d at 322.[4]

This Court recently reaffirmed the principle that an agency "must give effect to the unambiguously expressed intent of Congress." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, No. 96-843, 1998 U.S. Lexis 1448, at *35 (Feb. 25, 1998), quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The ADEA unambiguously requires that age-based discharge is prohibited unless age is a "bona fide occupational qualification reasonably necessary to the normal operation the particular business." 29 U.S.C. § 623(f)(1). A blanket rule, such as the Age 60 Rule, that takes no account of the unique conditions that particular pilots face in particular operations patently conflicts with the requirements of the statute

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[4]Federal Express asserts that Petitioner's decision to proceed under the ADEA serves to "put the public safety at risk." Resp.'s Br. at i. Since Petitioner, who had an unblemished safety record, served only in cargo operations, it is difficult to see how the public safety would be seriously threatened. This Court held in *Criswell* that public safety considerations do not justify any modification of the requirements for establishing a BFOQ because the need for public safety is a factor to be weighed in determining whether age is a BFOQ for a particular occupation. 472 U.S. at 419.

Significantly, air transport is the only means of transport that is subject to a maximum age limit for operators. There are no regulatory age limits for ship's officers, railroad engineers, or truck or bus drivers, although, unlike airplanes, these other modes of transport normally have only a single person operating the controls.

## CONCLUSION

The court below erred in failing to allow Petitioner the opportunity to assert his rights under the ADEA. The underlying conflict here threatens to corrode fundamental principles concerning the importance of civil rights and the extent of administrative agency discretion. As set forth in the Petition for Certiorari, this Court should grant certiorari to resolve conflicts in the courts and to define the limits of agency power.

Respectfully submitted,

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